

BEFORE THE
DEPARTMENT OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH Case No. L 2006070274

NATE T.,

Claimant,

vs.

SAN DIEGO REGIONAL CENTER,

Service Agency.

DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 21, and September 25 and 26, 2006, in San Diego, California.

Claimant's father, Ilya T, represented claimant, who was not present at the fair hearing.

Ronald R. House, Attorney at Law, represented the San Diego Regional Center (the SDRC or Service Agency).

The matter was submitted on September 26, 2006.

ISSUE

How many hours of respite care per month should the Service Agency fund for the claimant's family?

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant was born on November 5, 1989. Claimant has a “developmental disability” and is eligible for regional center “services and supports for persons with developmental disabilities” under Welfare and Institutions Code section 4712.¹ Such services and supports are provided through the San Diego Regional Center (SDRC), the family’s service agency.

2. On or about July 7, 2006, claimant’s father, Ilya T, requested a state fair hearing. In the fair hearing request, he asserted that SDRC should continue providing Nate and his family with 120 hours per month in respite services, as SDRC had funded for the two-month period immediately prior to July 1, 2006. On July 13, 2006, SDRC served claimant with a notice of hearing.

Nate’s Condition

3. Nate is a 16-year-old young man who has been diagnosed with autism and an obsessive-compulsive disorder. He lives at home with his parents and a 15-year-old brother. Nate was hospitalized at least five times during 2005 at the University of California, San Diego (UCSD) Child and Adolescent Psychiatric Service (CAPS) due to behavior problems including “uncontrollable aggression and a dangerous AWOL incident necessitating police involvement.” Nate’s aggressive acts have included hitting, kicking, and pushing his parents, and kicking holes in the wall at his family’s residence. He has also displayed temper tantrums on a regular basis, irregular sleep patterns, suicidal thoughts, depression, and highly erratic, impulsive behavior, such as touching people in public and in inappropriate ways. It has been asserted that Nate requires “constant supervision day and night.”²

4. In a November 13, 2005 letter to SDRC, Ilya T represented that Nate had Asperger syndrome, and that he had now recently “developed depression, tics, Tourette Syndrome, OCD, selective mutism, oppositional defiant behavior, seizure disorder, catatonia, impulse disorder, eating disorder with bulimia, extreme anxiety, rage, self abusive and antisocial behavior.” The biggest concern, according to that letter, was Nate’s “sudden explosive episodes of uncontrollable rage and outbursts at home.” These claims were for the most part unsupported by other documentation in the record.³

¹ All statutory references in this Decision are to the Welfare and Institutions Code, unless otherwise noted.

² Most of the matters set forth in this Factual Finding are taken from records of the Service Agency, whose information is based to some extent on information provided by Nate’s parents. A CAPS psychiatrist who treated Nate during a substantial period of hospitalization in late 2005 diagnosed Nate as having pervasive developmental disorder, mood disorder, and complex absence seizure.

³ Ilya T introduced letters from two mental health care professionals, both of which stated that Nate suffered from these conditions. The two letters in fact repeated *verbatim* the list of maladies, and related phrasing, found in Ilya T’s earlier-written letter. Neither writer explicitly stated that these difficulties were identified as a result of their own independent diagnoses. Neither letter discussed in any detail the basis or source of their statements. For these

5. SDRC expressed concern at the hearing that it did not have complete, current information about Nate's condition and behavior, which it attributed to Ilya T's refusal to authorize regional center staff to communicate directly with other educational and health care professionals and to have unfettered access to the records of such professionals.⁴ While Ilya T did not testify, in his capacity as claimant's representative he disputed the regional center's position in this regard.

At the hearing, SDRC stipulated that the number of monthly respite hours ultimately (Cal. Code Regs., tit. 10, § 2910, subds. (a)(1) and (4)) determined to be necessary and appropriate in this matter should be applied retroactively to July 1, 2006.⁵ Ilya T asserted in response that he was entitled to reimbursement for all out-of-pocket respite care expenses that Nate's family had incurred from July 1, 2006 (Cal. Code Regs., tit. 10, § 2910, subds. (a)(1) and (4)), through the date of the Decision in this matter. Claimant was given an opportunity to submit evidence of such claimed expenses, but he declined to submit such evidence. Accordingly, there is no factual basis in the record upon which to make any findings with regard to any such claimed reimbursement.

Based on the regional center's stipulation, it was unnecessary to resolve the issue whether claimant's representative hindered the regional center in its efforts to obtain the information it needed to make an informed decision about Nate's respite needs. The narrow issue involved in this proceeding is simply to determine, based on the testimonial and documentary evidence, the appropriate number of hours per month of on-going respite services that reasonably meets Nate's family needs.

Respite Care Previously Provided to Claimant

6. SDRC program manager Joyce James testified concerning the amount of respite services that had been provided to Nate's family in the past. Joyce's testimony was supported by documentation and was unrebutted. Her testimony is credited. According to James, Nate's family received past respite services approximately⁶ as follows:

reasons, it is inferred that the conditions identified in the two letters did not represent the diagnoses of the authors of those letters, but instead simply reflected the writers' understanding of the conditions that Ilya T represented Nate had.

⁴ In support of this contention, SDRC referenced in particular two documents: (i) a letter dated September 14, 2005, from Sharon McGilvery, a clinical psychologist, to Ilya T; and (ii) a letter dated April 18, 2006, from Ilya T to SDRC. Ilya T did not produce any particular documentation to support his contrary contention.

⁵ The appeal in this proceeding challenges an alleged termination of respite services as of July 1, 2006.

⁶ James was not completely sure about how some of the entries in SDRC documentation fit together, in terms of total respite services funded in certain months in late 2005 to early 2006, where there was an "overlap" between the time span of particular service requests.

- a. From September to December 2000: 16 hours per month.
- b. From December 2000 to September 2001: 32 hours per month.
- c. From March 2003 to September 2005: 30 hours per month.⁷
- d. From September to November 2005: 24 hours per month.
- e. From July 2005 to January 2006: 16 hours per month.
- f. December 2005: 90 hours.
- g. January 2006: 93 hours.
- h. May to June 2006: 120 hours per month.

7. For most, if not all, of the period from March 2003 through November 2005, the vendor (i.e., provider) of respite services was Nate's mother.⁸

8. The 90 hours for December 2005 was authorized on a limited-term ("one time only") basis, following Nate's return home after a two-month in-patient hospitalization at CAPS. Later in December, Nate was readmitted to CAPS. Upon his return home, SDRC authorized an additional limited-term ("one time only") 93 hours of respite for January 2006.

Respite Services for May and June 2006

9. In March 2006, the Sierra Academy, where Nate had been enrolled since the previous September, issued a notice that it was terminating, effective March 31, 2006, its individual service agreement, so that Nate could no longer attend the Academy. In April 2006, Ilya T requested that SDRC fund additional respite services. He advised regional center staff that he had called an emergency individualized educational assessment (IEP) meeting to help get Nate reintegrated into school on a regular basis.⁹ Ilya also advised regional center staff that his request for in-home support services (IHSS) had been denied and that he was filing an appeal. According to SDRC case notes, "Father is in agreement with requesting a time-limited contract of respite to allow him time for school meetings and IHSS appeal."

⁷ During a period from 2001 to 2002, Nate and his family were living in the Chicago area. This would explain the break in respite services reflected in the above dates.

⁸ The record does not reflect how the purposes of respite services (i.e., to provide a break for the parents of a developmentally disabled child) are served by contracting with the parents themselves to provide respite care.

⁹ As discussed below, Nate was enrolled in the Sierra Academy from September 2005 to March 31, 2006, when he was expelled.

The SDRC request for purchase of respite services stated that “this request is for time-limited emergency respite to allow the family time to address school, IHSS and ongoing behavior needs in the home.” Monthly objectives were to be developed for the family during the respite contract period. The focus was to be the family’s progress on meeting objectives for long-term solutions. The contract was to provide 236 hours over a two-month (May and June 2006) period, i.e., essentially six hours per weekday.

In May, 2006, according to SDRC case notes, regional center staff “emphasized that the current allotment of respite is to assist the family to get through their current crisis and address Nate’s long-term education and behavioral needs.”

At Ilya T’s request, on July 7, 2006, SDRC sent a letter confirming the nature of the respite services provided in May and June. The letter stated a high number of respite hours were provided “due to the extenuating circumstances reported by [claimant’s] . . . father, i.e., Nate’s non-attendance at school and the denial of In-Home Support Services (IHSS) Protective Supervision. It was communicated to Mr. [T] that the time-limited contract of respite was to provide him time to resolve these two issues. At that time, Mr. [T] stated he had requested an emergency IEP meeting and had filed an appeal with IHSS.” The letter went on to note that on June 30, 2006, Ilya had requested that the 120 hours per month respite care be continued past June 30 since there was no change to “Nate’s school situation or IHSS Protective Supervision determination.” The letter concluded by noting that “as we discussed and you agreed, written documentation of the status of Nate’s school placement and IHSS appeal is necessary to determine your respite needs at this time.”

James confirmed that the 120 monthly respite hours provided for May and June 2006 was time-limited, as opposed to on-going, in nature. That level of respite was funded in order to address three issues: (i) the family’s request for an IEP meeting; (ii) the denial of IHSS; and (iii) parental collaboration with a behavioral consultant concerning Nate’s in-home behavior problems.

According to James and SDRC’s Pat Burgo, who became Nate’s service coordinator in the spring of 2006, SDRC staff had several conversations with Ilya T in which it was explained that the 120 hours per month was being provided on a limited-term (two-month) basis. The expectation was that Ilya would be making progress toward getting Nate back in school and toward securing IHSS services.

Ilya T did not testify, nor was any evidence presented to controvert SDRC’s position. Accordingly, it is found that the unusually high number of respite hours for May and June 2006 was funded on a limited-term, two-month basis, in order to permit Nate’s family to address Nate’s school situation, the denial of IHSS services, and his in-home behavioral problems. It is further found that SDRC did not “terminate” the funding of that level of respite care on June 30, 2006; instead, it merely completed the two-month contract for such services.

10. As of the date of the hearing, the status of the three issues for which the limited-term funding of 120 hours per month of respite services was intended to address was as follows:

a. An IEP meeting had still not been held. No testimony was offered with regard to when an IEP would in fact be held. However, Nate was now back in school and, according to James, he was apparently doing well there. James' testimony was unrebutted, and is credited.

b. Nate's request for a rehearing with regard to the denial of his IHSS appeal was deemed denied by operation of law on July 21, 2006. No testimony was offered with regard to any additional steps Nate's family might take (e.g., a petition for a writ of administrative mandate, or a reapplication for IHSS based on changed circumstances) to secure such services for Nate.

c. According to the unrebutted testimony of regional center staff, Ilya T declined SDRC's offer to provide a behavioral consultant to help address Nate's behavioral problems. The testimony of SDRC staff is credited.

Accordingly, it is found that Nate's family is not presently taking any substantial active steps to address the three issues that led to the regional center's funding of the 120 hours per month respite care for May and June 2006. A continuing need for unusually high respite hours on a temporary basis thus does not presently exist.

Present On-Going Need for Respite Care

11. Joyce James has been a licensed clinical social worker since 1975. She has been with SDRC for 22 years, first as a service coordinator and then, since 1984, as a program manager. James became the program manager of Nate's unit (unit 19) in December 2005. Joyce testified in a very forthright, calm, non-defensive, credible manner.

12. James testified that SDRC considers a number of criteria in determining the amount of respite care to fund in a particular case, such as the consumer's situation (e.g., behavior issues, skill deficits), and the family's situation (e.g., the presence of other siblings, the impact of the consumer's disability on the family). The regional center asks for the family's assistance to help determine how much respite care is needed, e.g., by inquiring whether other caregivers within the family are available, and by seeking to understand the family's level of stress, and how the family will use the respite services. James explained that regional center guidelines take need into account, that the guidelines and a consumer's needs "work together." She added that if following the guidelines in a particular case would result in a family's need for respite services not being fully met, then the need for services would prevail over the guidelines.

Leslie Fogg, another SDRC program manager who was once also the program manager of Nate's unit, testified that the regional center considers need for respite services

within the context of the guidelines, but the that regional center sometimes goes beyond the guidelines to meet the family's needs. This is generally done on a time-limited basis.

Burgo also testified that the regional center looks at the guidelines, but she added that if respite needs exceed what the guidelines provide, the funding for respite services are provided based on family need. She stated that in Nate's case, the regional center considered the guidelines, but it was not necessarily bound to them, as evidenced by the tripling of the amount of respite services funded during the "time of crisis" (May and June 2006).

13. Joyce testified that Nate's current need for respite services, based on the information currently available to the regional center, was between 33 and 40 hours per month. James explained how this figure fit within the guidelines. In this regard, James testified that Nate's behaviors were within Level C, sublevel 2, of the guidelines, which provides as follows: "The primary care giver(s) may receive 33 to 40 hours/month in home . . . of Level C respite if any of the following criteria are met: . . . (d) Consumer has chronic and intense maladaptive behaviors which include one of the following: . . . (7) Behaviors interfere with sleep of primary care giver(s) on a regular basis." James added that the criteria for Level C, sublevel 3 (which corresponds to 41 to 56 hours per month of respite care) were not met. For example, Nate did not exhibit almost daily "AWOL," aggression resulting in injury, or the need for around the clock supervision. According to James, the intensity of behaviors required for Level C, sublevel 3 respite care hours were not met based on what the regional center has been told by the family.¹⁰

14. Ilya T submitted a number of letters from health care professionals in support of his contention that the family needs 180 hours of respite care per month.

Ann Schwartz, a licensed clinical social worker with Palomar Family Counseling Service, Inc., met with Nate weekly for counseling sessions from March 2006 until (at least) August 6, 2006, the date of her letter recommending 180 hours of respite care per month. In her letter, Schwartz referred to "the extreme pressure you [Ilya T] report, and I have observed you to be experiencing from the emotional and physical demands of your son, Nate." She also stated that "you reported Nate has multiple diagnoses for which he has been hospitalized: Asperger's Disorder, Tourette's Disorder, Obsessive-Compulsive Disorder." Her opinion was thus based largely on the representations of Nate's family. In addition, her opinion was stated in conclusory terms, i.e., "support at home such as at least six (6) hours respite care is a necessary preventive measure that is aimed at giving you a break from the intense care of your son." Schwartz did not testify.

Dr. Richard Heidenfelder, a San Diego psychiatrist, also recommended six hours of respite care per day to "allow Nate's parents to have a break from intense care of their son." He provided no details as to why this particular number of respite hours was necessary. The letter did refer to Nate as a "severely impaired young man who is in need of protective supervision around the clock." In this regard, Dr. Heidenfelder listed a large number of behaviors Nate allegedly exhibited. His list of behaviors is suspect for several reasons: (1)

¹⁰ See Legal Conclusion 6 for further discussion of the SDRC guidelines.

he did not state the basis or source for this list of behaviors; (2) he did not state that he himself personally observed any of them; (3) he did not state the nature or extent of any examination of or interaction with Nate that he himself may have had; (4) at least one or two of the matters he characterized as “behaviors” were not behaviors, but instead conditions (i.e., Tourette syndrome, seizure disorder); (5) he did not state the basis for any conclusion that Nate did in fact have these conditions; (6) he did not even explicitly state that these conditions represented his own personal diagnosis of Nate; (7) the list of behaviors and conditions was very similar to that contained in Ilya T’s letter of the previous November referenced above;¹¹ and (8) it does not appear that Dr. Heidenfeld personally signed the letter. Since Dr. Heidenfelder did not testify at the hearing, it was not possible to inquire further with regard to these matters.

LEGAL CONCLUSIONS

Burden of Proof

1. “The moving party—that is, the party asserting the claim or making the charges — generally has the burden of proof” in administrative proceedings. (Cal. Administrative Hearing Practice (Cont. Ed. Bar 2d ed. 1997) § 7.50, p. 365.) No published decision has been found that addresses the applicability of this general principle applies to Lanterman Act fair hearing proceedings. It is concluded by analogy, however, that the party in such proceedings who seeks to change the status quo has the burden of proof.¹²

In the present proceeding, the consumer seeks to change the level of services. From September 2000 through November 2005, the service agency funded between 16 to 32 hours of respite care per month. This level of funding was consistent with the service agency’s guidelines and the on-going needs of the consumer and his family. This established level of funding was increased in December 2005 due to temporary special circumstances. The 120 monthly hours of respite services temporarily funded by SDRC in May and June 2006 was likewise and unequivocally for a short, precisely-defined, limited term; it did not represent an on-going level of funding. Claimant seeks to characterize the limited-term, crisis-level funding as on-going and permanent in nature. Notwithstanding this mischaracterization, the consumer has the burden of proof in the matter to establish a change of circumstances sufficient increase funding from a base level of 16-32 hours per month.

Statutory and Regulatory Authority

2. “The Legislature has enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act . . . to provide a ‘pattern of facilities and

¹¹ See Factual Finding 4 and footnote 3.

¹² See also Evidence Code section 500, which provides that “[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” In this proceeding, it is the consumer who has made the claim for relief.

services . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life.’ (§ 4501.) Such services include locating persons with developmental disabilities (§ 4641); assessing their needs (§§ 4642-4643); and, on an individual basis, selecting and providing services to meet such needs (§§ 4646-4647). The purpose of the statutory scheme is twofold: To prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (§§ 4501, 4509, 4685), and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community (§§ 4501, 4750-4751).

* * *

In the Lanterman Act ‘[the] State of California accepts a responsibility for its developmentally disabled citizens and an obligation to them which it must discharge.’ (§ 4501.) In so doing, the Legislature has not only recognized that ‘[persons] with developmental disabilities have the same legal rights and responsibilities [as those] guaranteed all other individuals by the Federal Constitution and laws and the Constitution and laws of the State of California’ (§ 4502), but has also granted them certain statutory rights, including the right to treatment and habilitation services at state expense. (See §§ 4502, 4620, 4646-4648.)

To implement this scheme of statutory rights of developmentally disabled persons and the corresponding obligations of the state toward them, the Legislature has fashioned a system in which both state agencies and private entities have functions. Broadly, DDS, a state agency, ‘has jurisdiction over the execution of the laws relating to the care, custody, and treatment of developmentally disabled persons’ (§ 4416), while ‘regional centers,’ operated by private nonprofit community agencies under contract with DDS, are charged with providing developmentally disabled persons with ‘access to the facilities and services best suited to them throughout their lifetime’ (§ 4620).

* * *

The rights of developmentally disabled persons and the corresponding obligations of the state toward them under the Lanterman Act are implemented in the Individual Program Plan (IPP) procedure. Under the Act, the regional centers are required to develop an IPP for each client. (§ 4647.) The IPP must be prepared and reviewed and, if necessary, modified at least annually, and must include the following: an assessment of the client’s capabilities and problems; a statement of time-limited objectives for improving his situation; a schedule of the type and amount of services necessary to achieve these objectives; and a schedule of periodic review to insure that the services have been provided and the objectives have been reached. (§ 4646.) While it is true, as the Attorney General has observed, that the regional centers have ‘wide discretion’ in determining *how* to implement the IPP (62 Ops.Cal.Atty.Gen., *supra*, 229, 230; see § 4648), they have no discretion at all in determining *whether* to implement it: they must do so (§ 4648).” (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 388-390.)

3. Welfare and Institutions Code section 4646, subdivision (a) provides as follows:

“It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.”

4. California Code of Regulations, title 17, section 53202 provides in pertinent part as follows:

“(a) The following definitions shall apply to the language contained in Sections 54310 through 54390 of these regulations:

* * *

(38) "In-home Respite Services" means intermittent or regularly scheduled temporary non-medical care and supervision provided in the consumer's own home and designed to do all of the following:

(A) Assist family members in maintaining the consumer at home;

(B) Provide appropriate care and supervision to protect the consumer's safety in the absence of family members;

(C) Relieve family members from the constantly demanding responsibility of caring for a consumer; and

(D) Attend to the consumer's basic self-help needs and other activities of daily living, including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by the family member.”

5. California Code of Regulations, title 17, section 567776 provides in pertinent part as follows:

“(a) As used in this article,¹³ the following words and phrases have the meanings specified in section 54302 of these regulations:

* * *

(8) In-home Respite Services”

Regional Center Guidelines

6. SDRC has issued guidelines relating to the provision of services and supports to consumers and their families. The guidelines have been approved by the California Department of Developmental Services. Respite services are addressed in subsection (g) of section V of the guidelines.

The guidelines define respite services as “the provision of intermittent and/or regularly scheduled temporary care to persons who are eligible for Regional Center services on an in-home or out-of-home basis. It is designed to relieve families for short periods of time of the constant responsibility of caring for the family member. Respite services are designed to revitalize both the consumer and family while assisting the consumer to be maintained in the home. Respite service is not meant to furnish child care for working parents, nor is it to be used for extended day care.” (SDRC Guidelines, section V(g)(2).)

The guidelines prescribe criteria by which the needed level of respite services may be determined. In general terms, “respite services will be purchased by SDRC based upon the individual needs of the consumer and family and not upon rigid, inflexible standards.” More specifically, the guidelines provide five levels of respite services. With respect to each level, certain criteria or factors relating to the child and the caregiver and other relevant matters are identified, along with a range of respite hours that are to be provided pursuant to that level. Essentially, each level involves, in ascending order, increasingly serious or severe conditions and circumstances, and thus a corresponding higher number of respite hours that are available to the family under those conditions and circumstances.

The levels are as follows:

- Level A: “1 to 8 hours per month,” for in-home care.
- Level B: “9 to 16 hours per month,” for in-home care.¹⁴
- Level C is divided into four tiers. The first tier provides for “17 to 32 hours/month in home” The second tier provides for “33 to 40

¹³ Article 5 (standards for in-home respite services agencies) of subchapter 5 of Chapter 3 of Division 2 of title 17 of the California Code of Regulations.

¹⁴ It is noted with an asterisk that “Level B = Level A hours plus the additional 9-16 hours.”

hours/month in home”¹⁵ The third tier provides for “41 to 56 hours/month . . . in home” The fourth tier provides for “over 56 hours/month. . . .”

- Level D is also divided into four tiers: (i) 1 to 16 hours per month; (ii) 17 to 24 hours per month; (iii) 25 to 40 hours per month; and (iv) over 40 hours per month. Unlike Levels A through C, level D respite is to be provided only for a “time-limited situation which increases the consumer’s requirements for care or which decreases the primary care giver’s ability to provide that care.” In other words, Level D is not intended to provide for respite services on a regular, on-going basis.
- Level F¹⁶ is “one time only respite to meet an emergency or other special need.”

A regional center’s guidelines may not take precedence over the established needs of the consumer, which are ultimately paramount. (*Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390-393.)¹⁷

Analysis

7. The parties are in agreement that Nate’s family should receive respite services. The only matter in dispute is the number of hours of respite services the family should receive on a monthly basis.

James credibly testified that 40 hours per month represent an appropriate number of hours. This amount is consistent with SDRC guidelines and with the needs of Nate’s family,

¹⁵ It is again noted with an asterisk that “Level C = Level B hours plus the additional 17 or more hours.” The references that “Level B = Level A hours plus the additional 9-16 hours” and “Level C = Level B hours plus the additional 17 or more hours” are puzzling. The consumer takes the position that the hours specified for each level are to be added to those specified in the preceding level so that, for example, Level C hours include the 16 level B hours plus an additional 17 (or more) Level C hours per month. James testified that the regional center views the language as a restatement, albeit in unclear language, that each successive level builds on the hours of the previous level, i.e., that Level C in essence picks up where Level B leaves off. The latter interpretation seems correct. If it were not, then the number of respite hours per month would jump from 8 to 17 (maximum Level A hours to minimum Level B hours) and from 24 to 41 (maximum Level B hours to minimum Level C hours). Because the regional center is in the best position to interpret its own guidelines, and because the regional center’s interpretation—providing for a smooth and continuous transition in hours from one level to the next—makes much more sense than does the alternative, it is concluded that a family would normally receive 1 to 8 total respite hours per month if their circumstances fit within Level A criteria, 9 to 16 hours per month (for Level B), and 17 or more (for Level C).

¹⁶ There is no Level E.

¹⁷ The decision in *Association of Retarded Citizens* stands for the proposition that the Department of Developmental Services may not enact regulations that would be inconsistent with the obligation to meet a consumer’s needs on an individualized basis. This same reasoning would apply to any guidelines promulgated by a regional center.

because respite services involve temporary non-medical care and supervision of a consumer which is provided in the consumer's own home and designed to relieve family members from the constantly demanding responsibility of caring for a consumer.

The letters submitted on behalf of Nate's family, in which a far higher number of respite hours were recommended, have been considered. However: (a) these letters appeared to be based largely on what Ilya T told the writers; (b) there was no indication that Nate's conditions as identified in the letters constituted an independent diagnosis of the writers themselves; (c) the familiarity with respite care and regional center guidelines could not be discerned; (d) the recommended hours of respite care were given in conclusory terms without any meaningful explanation as to how the numbers were arrived at; and (e) none of the writers testified, and thus the basis for and validity of their opinions could not be probed at the hearing. Accordingly, the letters were of very little, if any, probative value.

Further, the circumstances under which SDRC temporarily funded 120 hours per month of respite services for May and June 2006 no longer exist. In this regard: (a) the appeal from the IHSS decision was denied; (b) Nate is now in a new school and is apparently doing well; and (c) Ilya T declined SDRC's offer to fund a behavior consultant to address Nate's in-home behavior issues.

8. By reason of Factual Findings 1 through 14 and Legal Conclusions 1 through 7, it is concluded that the service agency's funding 40 hours per month of respite services meets the needs of Nate's family and is appropriate.¹⁸

Accordingly, there is hereby issued the following:

¹⁸ Ilya T also argued that since the Regional Center funded 30 hours per month of respite services at times in the past when Nate was doing well, far more hours per month of respite services are now needed, since Nate has recently developed much more serious conditions. The record does not support Ilya T's contention that Nate's condition is so much (if at all) more severe now than it was at different times in the past. Further, as noted earlier, the vendor providing most of the respite care to Nate's family in the past was Nate's own mother, and, given the purpose of respite care (to provide needed rest to a consumer's caretakers), it is difficult to see how respite care could be meaningfully provided under those circumstances. Finally, there were undoubtedly numerous factors that affected the differing levels of need, and thus respite services, that were provided to Nate's family at different time periods. It would be inappropriate and counter productive for the ALJ to try to speculate exactly what those were, and to try to compare them to the unique circumstances here at issue. Instead, and more directly, the issue to be determined in this proceeding is the amount of respite services that are necessary at the present time to meet the family's needs.

Similarly, Ilya T submitted a number of prior administrative Decisions relating to respite services, in which substantially more than 40 hours per month were found appropriate. However, each of those cases arose in a unique procedural and factual context, substantially different from that involved here. Further, regardless of what other ALJs may have decided in other cases, this ALJ has the responsibility and obligation to decide this particular case on the basis of the totality of circumstances attendant here.

ORDER

1. Claimant's appeal regarding the Service Agency's asserted obligation to continue to fund 120 hours of respite services per month is denied.

2. The Service Agency shall fund 40 hours per month of respite services.

NOTICE

This is the final administrative decision in this matter. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days.

DATED: _____

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings